

The Return of the Rejected Kings: A Comparative Study of Governance and Procedures of Standards Development Organizations under the Theory of Private Ordering

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Abstract : Standardization has been in the limelight of numerous academic studies. Typically described as ‘any set of technical specifications that either provides or is intended to provide a common design for a product or process’, standards do not only set quality benchmarks for products and services, but also spur competition and innovation, resulting in advantages for manufacturers and consumers. Their contribution to globalization and technology advancement is especially crucial in the Information and Communication Technology (ICT) and telecommunications sector, which is also characterized by a weaker state-regulation and expert-based rule-making. Most of the standards developed in that area are interoperability standards, which allow technological devices to establish ‘invisible communications’ and to ensure their compatibility and proper functioning. This type of standard supports a large share of our daily activities, ranging from traffic coordination by traffic lights to the connection to Wi-Fi networks, transmission of data via Bluetooth or USB and building the network architecture for the Internet of Things (IoT). A large share of ICT standards is developed in the specialized voluntary platforms, commonly referred to as Standards Development Organizations (SDOs), which gather experts from various industry sectors, private enterprises, governmental agencies and academia. The institutional architecture of these bodies can vary from semi-public bodies, such as European Telecommunications Standards Institute (ETSI), to industry-driven consortia, such as the Internet Engineering Task Force (IETF). The past decades witnessed a significant shift of standard setting to those institutions: while operating independently from the states regulation, they offer a rather informal setting, which enables fast-paced standardization and places technical supremacy and flexibility of standards above other considerations. Although technical norms and specifications developed by such nongovernmental platforms are not binding, they appear to create significant regulatory impact. In the United States (US), private voluntary standards can be used by regulators to achieve their policy objectives; in the European Union (EU), compliance with harmonized standards developed by voluntary European Standards Organizations (ESOs) can grant a product a free-movement pass. Moreover, standards can de facto manage the functioning of the market when other regulative alternatives are not available. Hence, by establishing (potentially) mandatory norms, SDOs assume regulatory functions commonly exercised by States and shape their own legal order. The purpose of this paper is threefold: First, it attempts to shed some light on SDOs’ institutional architecture, focusing on private, industry-driven platforms and comparing their regulatory frameworks with those of formal organizations. Drawing upon the relevant scholarship, the paper then discusses the extent to which the formulation of technological standards within SDOs constitutes a private legal order, operating in the shadow of governmental regulation. Ultimately, this contribution seeks to advise whether a state-intervention in industry-driven standard setting is desirable, and whether the increasing regulatory importance of SDOs should be addressed in legislation on standardization.

Keywords : private order, standardization, standard-setting organizations, transnational law

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